

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BARBARA J. HELMS,)	
)	No. CV-07-0358-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on June 23, 2008. (Ct. Rec. 14, 16). Plaintiff Barbara J. Helms ("Plaintiff") filed a reply brief on May 28, 2008. (Ct. Rec. 18). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Thomas M. Elsberry represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 8). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits ("DIB") on May 22, 2000, and an application for Supplemental Security Income ("SSI") benefits on June 13, 2000,

1 alleging disability since April 1, 1995.¹ (AR 71-73, 382-388).
2 The applications were denied initially and on reconsideration. An
3 administrative hearing was held before Administrative Law Judge
4 ("ALJ") Paul L. Gaughen on April 11, 2002. (AR 404-443). On
5 November 7, 2002, the ALJ issued a decision finding that Plaintiff
6 was not disabled. (AR 19-36). The Appeals Council denied
7 Plaintiff's request for review, and Plaintiff proceeded to the
8 United States District Court. On July 15, 2004, based upon a
9 stipulation of the parties, the matter was remanded for further
10 administrative proceedings. (AR 474-475). The Court directed the
11 ALJ, on remand, to "properly develop an assessment of Plaintiff's
12 residual functional capacity; re-contact Dr. Toews for
13 clarification of the formatting error on his report (citing a
14 different claimant); obtain a supplemental psychological
15 consultative examination; and obtain psychiatric medical expert
16 evidence, if necessary." (AR 474).

17 An administrative hearing was held before the ALJ on October
18 6, 2005, at which time the ALJ heard testimony from Plaintiff,
19 Erika Klossner, medical expert Ronald M. Klein, Ph.D., and
20 vocational expert Tom Moreland. (AR 631-676). On January 19,
21 2006, the ALJ issued a decision finding that Plaintiff was not
22 disabled. (AR 457-467). The ALJ's decision incorporated by
23 reference his previous decision in this case. (AR 459). On
24 September 26, 2007, the Appeals Council denied Plaintiff's request

25
26 ¹Plaintiff filed subsequent applications for DIB and SSI
27 on August 18, 2004, and, based on those applications, it was
28 determined that the severity of Plaintiff's pulmonary disease
equaled Listing 3.02A, effective August 1, 2004. (AR 457).
Therefore, the relevant time period under review is prior to
August 1, 2004.

1 for review. (AR 444-447). Therefore, the ALJ's decision became
2 the final decision of the Commissioner, which is appealable to the
3 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed an
4 action for judicial review pursuant to 42 U.S.C. § 405(g) on
5 November 6, 2007. (Ct. Rec. 2).

6 STATEMENT OF FACTS

7 The facts have been presented in the administrative hearing
8 transcripts, the ALJ's decisions, and Plaintiff's brief and will
9 only be summarized here. Plaintiff was 49 years old on August 1,
10 2004. (AR 464). Plaintiff completed the 11th grade and received
11 her GED in 1973. (AR 92). Her past work experience includes work
12 as a food assembler, kitchen; a cafeteria attendant, combination;
13 and a deli clerk/slicer. (AR 662). She alleges disability as of
14 April 1, 1995, due to depression, memory and concentration
15 problems, possible dyslexia, breathing problems, arthritis in both
16 hands, a right foot impairment and pleurisy. (AR 86). Plaintiff
17 testified at the administrative hearing held on October 6, 2005,
18 that she additionally suffered from symptoms related to hepatitis
19 C. (AR 652). Plaintiff also stated that she had regularly
20 attended counseling for her psychological symptoms on a weekly
21 basis since April of 2002. (AR 652).

22 SEQUENTIAL EVALUATION PROCESS

23 The Social Security Act (the "Act") defines "disability" as
24 the "inability to engage in any substantial gainful activity by
25 reason of any medically determinable physical or mental impairment
26 which can be expected to result in death or which has lasted or
27 can be expected to last for a continuous period of not less than
28 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The

1 Act also provides that a Plaintiff shall be determined to be under
2 a disability only if his impairments are of such severity that
3 Plaintiff is not only unable to do his previous work but cannot,
4 considering Plaintiff's age, education and work experiences,
5 engage in any other substantial gainful work which exists in the
6 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
7 Thus, the definition of disability consists of both medical and
8 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
9 (9th Cir. 2001).

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled.
12 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
13 engaged in substantial gainful activities. If he is, benefits are
14 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
15 decision maker proceeds to step two, which determines whether
16 Plaintiff has a medically severe impairment or combination of
17 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

18 If Plaintiff does not have a severe impairment or combination
19 of impairments, the disability claim is denied. If the impairment
20 is severe, the evaluation proceeds to the third step, which
21 compares Plaintiff's impairment with a number of listed
22 impairments acknowledged by the Commissioner to be so severe as to
23 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
24 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
25 meets or equals one of the listed impairments, Plaintiff is
26 conclusively presumed to be disabled. If the impairment is not
27 one conclusively presumed to be disabling, the evaluation proceeds
28 to the fourth step, which determines whether the impairment

1 prevents Plaintiff from performing work he has performed in the
2 past. If Plaintiff is able to perform his previous work, he is
3 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
4 cannot perform this work, the fifth and final step in the process
5 determines whether Plaintiff is able to perform other work in the
6 national economy in view of his residual functional capacity and
7 his age, education and past work experience. 20 C.F.R. §§
8 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon Plaintiff to establish
10 a *prima facie* case of entitlement to disability benefits.
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
12 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
13 met once Plaintiff establishes that a physical or mental
14 impairment prevents him from engaging in his previous occupation.
15 The burden then shifts to the Commissioner to show (1) that
16 Plaintiff can perform other substantial gainful activity and (2)
17 that a "significant number of jobs exist in the national economy"
18 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
19 (9th Cir. 1984).

20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a
22 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
23 the Commissioner's decision, made through an ALJ, when the
24 determination is not based on legal error and is supported by
25 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
26 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
27 1999). "The [Commissioner's] determination that a plaintiff is
28 not disabled will be upheld if the findings of fact are supported

1 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
2 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
3 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
4 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
6 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
7 573, 576 (9th Cir. 1988). Substantial evidence "means such
8 evidence as a reasonable mind might accept as adequate to support
9 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
10 (citations omitted). "[S]uch inferences and conclusions as the
11 [Commissioner] may reasonably draw from the evidence" will also be
12 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
13 On review, the court considers the record as a whole, not just the
14 evidence supporting the decision of the Commissioner. *Weetman v.*
15 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
16 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

17 It is the role of the trier of fact, not this court, to
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
19 evidence supports more than one rational interpretation, the court
20 may not substitute its judgment for that of the Commissioner.
21 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
22 (9th Cir. 1984). Nevertheless, a decision supported by
23 substantial evidence will still be set aside if the proper legal
24 standards were not applied in weighing the evidence and making the
25 decision. *Browner v. Secretary of Health and Human Services*, 839
26 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
27 evidence to support the administrative findings, or if there is
28 conflicting evidence that will support a finding of either

1 disability or nondisability, the finding of the Commissioner is
2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
3 1987).

4 **ALJ'S FINDINGS**

5 The ALJ found at step one that Plaintiff has not engaged in
6 substantial gainful activity during the relevant time period. (AR
7 459). At step two, the ALJ determined that, prior to August 2004,
8 Plaintiff had the severe impairments of chronic obstructive
9 pulmonary disease, bronchitis with a history of asthma, a
10 depressive disorder, NOS, with noted episodes of major depression,
11 drug and alcohol addiction, a personality disorder, NOS, and a
12 cognitive disorder characterized by seizure-like symptoms. (AR
13 460-461). However, without Plaintiff's drug addiction and/or
14 alcoholism², the ALJ found that, before August 2004, Plaintiff's
15 severe impairments were bronchitis with a history of asthma and
16 chronic obstructive pulmonary disease and determined that her
17 mental impairments were not severe. (AR 461). The ALJ further
18 concluded that, without consideration of Plaintiff's substance
19 abuse, Plaintiff did not have an impairment or combination of
20 impairments listed in or medically equal to one of the Listings
21 impairments. (AR 461).

22 The ALJ found that, prior to August 2004 and without
23 consideration of substance abuse, Plaintiff had the residual
24 functional capacity ("RFC") to perform medium exertion level work
25 with no exposure to fumes and odors. (AR 463). He indicated that
26

27
28 ²The ALJ found Plaintiff's substance abuse to be a
contributing factor material to the determination of disability.
(AR 461). Plaintiff does not contest this finding.

1 Plaintiff would need to work in an alcohol-free environment, could
2 not do complex memory tasks, needed a structured environment, had
3 poor adaptive skills and decompensated or slowed during adjustment
4 and could not work in close proximity to others because she would
5 distract them. (AR 463). She also had slight limitations on
6 neatness, cleanliness, and accepting criticism and was slow in
7 learning detailed instructions. (AR 463).

8 At step four of the sequential evaluation process, the ALJ
9 determined that Plaintiff would not be able to perform her past
10 relevant work as a food assembler, cafeteria attendant or deli
11 slicer. (AR 463). However, based on the testimony of the
12 vocational expert and considering Plaintiff's age, educational
13 background, work experience and RFC, the ALJ concluded that, prior
14 to August 2004, Plaintiff was capable of making a successful
15 adjustment to work that existed in significant numbers in the
16 national economy. (AR 464-465). Accordingly, the ALJ determined
17 at step five of the sequential evaluation process that Plaintiff
18 was not disabled within the meaning of the Social Security Act at
19 any time prior to August 2004. (AR 465-467).

20 ISSUES

21 Plaintiff argues that she was more limited from a
22 psychological standpoint than as determined by the ALJ. (Ct. Rec.
23 15 at 14-20). This Court must uphold the Commissioner's
24 determination that Plaintiff is not disabled if the Commissioner
25 applied the proper legal standards and there is substantial
26 evidence in the record as a whole to support the decision.

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1 The ALJ in this case reevaluated Plaintiff's residual
2 functional capacity in accord with the remand order. (AR 459-
3 463). He additionally re-contacted Dr. Toews for clarification of
4 the formatting error on his report (citing a different claimant).
5 Dr. Toews responded that the inconsistency identified in his
6 report was merely a scrivener's error. (AR 611). Dr. Toews
7 submitted a corrected copy of Plaintiff's consultative evaluation.
8 (AR 611-616).

9 The ALJ also obtained a supplemental psychological
10 consultative examination, in accordance with the remand order, as
11 evidenced by the June 24, 2005 report of Joyce Everhart, Ph.D.
12 (AR 617-628). Finally, the ALJ obtained supplemental medical
13 expert testimony from Ronald Klein, Ph.D. (AR 639-651). While
14 Dr. Klein is not a psychiatrist, the remand order directed the ALJ
15 to obtain psychiatric medical expert evidence "if necessary." (AR
16 474). The ALJ was thus given discretion with respect to medical
17 expert testimony and, apparently, deemed "psychiatric" medical
18 testimony unnecessary in this case. The ALJ did not act contrary
19 to the remand order by eliciting testimony from Dr. Klein, a
20 psychologist.

21 Based on the foregoing, it is apparent that the ALJ properly
22 followed the directives of the Court's July 15, 2004 remand order.
23 Plaintiff's argument to the contrary is without merit.

24 **B. Mental Limitations**

25 With respect to Plaintiff's mental health, Plaintiff argues
26 that the ALJ erroneously relied on a one-time evaluator and the
27 medical expert over the opinions of Dr. Everhart and Dr. Arnold.

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1 (Ct. Rec. 15 at 15-19). The Commissioner responds that the ALJ
2 properly evaluated the mental health evidence of record. (Ct.
3 Rec. 19-2).

4 The ALJ found that, prior to August 2004 and without
5 consideration of substance abuse, Plaintiff would need to work in
6 an alcohol-free environment, could not do complex memory tasks,
7 needed a structured environment, had poor adaptive skills and
8 decompensated or slowed during adjustment, could not work in close
9 proximity to others because she would distract them, had slight
10 limitations on neatness, cleanliness, and accepting criticism and
11 was slow in learning detailed instructions. (AR 463). In making
12 this determination, the ALJ evaluated the medical evidence of
13 record pertaining to Plaintiff's mental ability. He also
14 indicated that his prior decision (AR 19-36) fully described
15 Plaintiff's impairments and was incorporated by reference and that
16 the current decision discussed the evidence that had been received
17 subsequent to that decision and clarified the previous decision.
18 (AR 459).

19 On August 18, 2000, James E. Bailey, Ph.D., submitted a
20 report following an evaluation of Plaintiff. (AR 249-253). Dr.
21 Bailey noted that Plaintiff had a long history of substance abuse
22 and that Plaintiff reported using heroin two days prior to the
23 exam. (AR 250). Dr. Bailey indicated that Plaintiff appeared
24 either high or somewhat groggy during the interview and suggested
25 an index of either malingering or heroin intoxication. (AR 250).
26 He indicated that her reported substance abuse was not consistent
27 with the records in the file, which showed more recent use, and he
28 generally doubted her credibility. (AR 251). Dr. Bailey

1 diagnosed opioid dependence, continuous, rule out opioid
2 intoxication, and rule out malingering and determined that other
3 Axis I diagnoses were not possible, including depression, due to
4 Plaintiff's continuing substance abuse. (AR 252). He also
5 diagnosed a mixed personality disorder with narcissistic and
6 dependent features, and gave a GAF score of 40.³ (AR 252).

7 Jay M. Toews, Ed.D., evaluated Plaintiff on October 29, 2001.
8 (AR 612-616). Dr. Toews documented Plaintiff's long history of
9 substance abuse, primarily heroin, dating back to at least 1996.
10 (AR 612-613). Although Plaintiff stated she had been clean and
11 sober for a couple of years, Dr. Toews noted that this statement
12 contradicted Dr. Bailey's report that Plaintiff had been using
13 heroin two days prior to her visit with him in August 2000. (AR
14 613).

15 At the time of the examination, Dr. Toews indicated that
16 Plaintiff smelled of cannabis, but denied using marijuana. (AR
17 614). Plaintiff exhibited childlike affect and behavior and gave
18 immature responses. (AR 614). Dr. Toews noted that there was
19 significant question regarding malingering and indicated that the
20 results of the malingering assessment suggested a likelihood that
21 Plaintiff was deliberately exaggerating her symptoms. (AR 614-
22 615). Dr. Toews diagnosed malingering, probable, rule out
23 cannabis abuse, opioid dependence in self reported full remission,
24 a depressive disorder, NOS, with anxious features, and borderline
25

26 ³A GAF of 40-31 indicates "[s]ome impairment in reality
27 testing or communication OR major impairment in several areas,
28 such as work or school, family relations, judgment, thinking,
or mood." See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32
(4th ed. 1994).

1 intellectual functioning, probable. (AR 616). Dr. Toews also
2 diagnosed Hepatitis A, B and C, asthma, chronic disease, lack of
3 primary support and social isolation and gave a GAF score of 50.⁴
4 (AR 616).

5 Dr. Toews additionally answered interrogatory requests on
6 September 2, 2002. (AR 378-381). Dr. Toews indicated that his
7 assignment of a GAF score of 50 reflected Plaintiff's appearance
8 at the time of the exam, assessment of intellectual functioning,
9 affective presentation and probable substance abuse. (AR 380).
10 He indicated that it was his impression that Plaintiff was or had
11 recently used marijuana at the time of the evaluation. (AR 380).
12 He further stated that malingering was factored in to the
13 assessment of the GAF score as malingering "was felt to lead to
14 grossly exaggerated physical or psychological symptoms." (AR 380-
15 381).

16 Ronald M. Klein, Ph.D., testified as a medical expert at the
17 administrative hearing held on October 6, 2005. (AR 639-651).
18 Dr. Klein indicated that Plaintiff's primary clinical diagnosis
19 was malingering. (AR 640). He stated that malingering was
20 referred to repeatedly in the record and was as well supported as
21 any he had viewed in the past two to three years. (AR 640).

22 While Dr. Klein indicated that he endorsed Dr. Everhart's
23 diagnosis of malingering (AR 651), he did not understand how Dr.
24 Everhart opined on a Mental Medical Source Form that Plaintiff had

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26 ⁴A GAF of 50-41 reflects: "[s]erious symptoms (e.g.,
27 suicidal ideation, severe obsessive rituals, frequent
28 shoplifting) or any serious impairment in social, occupational,
or school functioning (e.g., no friends, unable to keep a
job)." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 32 (4th
ed. 1994).

1 moderate to marked impairments (AR 641). Dr. Klein speculated
2 that Dr. Everhart factored out Plaintiff's malingering in deriving
3 her ratings on the form. (AR 649). He suggested that the ALJ
4 disregard Dr. Everhart's findings on the Mental Medical Source
5 Form. (AR 641).

6 Dr. Everhart examined Plaintiff on or about June 24, 2005.
7 (AR 617-628). Dr. Everhart noted that, inconsistent with the
8 record, Plaintiff reported she had been mostly drug and alcohol
9 free for ten years, she had not experimented with any drugs other
10 than marijuana and pain medication, had used only marijuana and
11 pain medication, and had been clean and sober for fifteen years.
12 (AR 620-621, 622). Results of the MMPI-2 suggested exaggeration
13 of symptoms. (AR 623). Results of the WMS-III did not appear to
14 be a valid estimate of her current memory functioning and
15 suggested malingering. (AR 624). A score of six on the Rey 15
16 Item Visual Memory Test suggested malingering. (AR 625).

17 Dr. Everhard diagnosed a depressive disorder, NOS, with
18 psychotic features, malingering, a personality disorder, NOS, with
19 dependent, narcissistic and schizotypal features, opioid
20 dependence, remission status unknown, and a cognitive disorder,
21 NOS, by history and record as well as problems with executive
22 functioning on Trails A and B and gave Plaintiff a Global
23 Assessment of Functioning ("GAF") score of 45-50. (AR 624-625).
24 Dr. Everhart marked boxes on a Medical Source Statement of Ability
25 To Do Work-Related Activities (Mental) form indicating that
26 Plaintiff had several moderate and marked limitations on her
27 ability to perform work-related mental activities. (AR 627-628).

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1 However, Dr. Everhart also handwrote on the form, "Caution: note
2 possibility (and diagnosis) of malingering." (AR 627).

3 While Plaintiff contends that the ALJ erred by failing to
4 provide "proper reasoning for basically rejecting Dr. Everhart's
5 opinion" (Ct. Rec. 15 at 17), the ALJ did not reject Dr.
6 Everhart's report. To the contrary, the ALJ's findings are
7 consistent with Dr. Everhart's narrative opinion which noted
8 several inconsistencies with Plaintiff's drug use reporting and
9 diagnosed malingering, a depressive disorder, NOS, a personality
10 disorder, NOS, a cognitive disorder, NOS, and opioid dependence.
11 (AR 460-461, 624-625). It is apparent that, as suggested by the
12 medical expert (AR 641), the ALJ considered Dr. Everhart's check-
13 box assessment form within the context of her cautionary note
14 regarding the diagnosed and well supported finding of malingering.

15 Between May 1999 and 2003, John Arnold, Ph.D., also performed
16 several psychological assessments. (AR 212-215, 216-219, 363-366,
17 368-377, 544-547, 548-555). As noted by Plaintiff, on all of
18 these occasions, Dr. Arnold was of the opinion that Plaintiff had
19 severe mental impairments causing more than slight abnormalities
20 on her ability to work. (Ct. Rec. 15 at 18). However, while Dr.
21 Arnold remarked at the initial evaluation about Plaintiff's
22 extensive drug use history, treatment and relapses, later
23 evaluations fail to comment on the effects of Plaintiff's drug use
24 on her functioning ability despite clear record evidence of
25 continued drug use during that time period.⁵ The ALJ discounted

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27 ⁵Dr. Arnold's final check-box form evaluation, dated August
28 8, 2003, does, however, indicate that Plaintiff had relapsed
three to four times on heroin with the latest relapse three
months prior to the August 8, 2003 report. (AR 553).

1 Dr. Arnold's opinions because he did not assess her functioning
2 given the effects of a substance addiction disorder. (AR 32).

3 The ALJ also found significant that Dr. Arnold noted that
4 personality testing suggested over-endorsement of psychopathology
5 but excluded these findings in assessing Plaintiff's psychological
6 functioning and also suggested that there was a question as to her
7 motivation and effort in prior formal IQ testing. (AR 32). As
8 noted above, the diagnosis of malingering is well supported in the
9 record. *Supra*. Furthermore, the ALJ concluded that Dr. Arnold's
10 assessments were entitled to less weight because Plaintiff saw him
11 on these occasions to be evaluated or reevaluated for benefit
12 eligibility purposes. (AR 462). When a physician is involved in
13 the application process, thus becoming an advocate for the
14 claimant, an ALJ is entitled to consider this factor in evaluating
15 his assessment. *Crane v. Shalala*, 76 F.3d 251, 254 (9th Cir.
16 1996). The ALJ additionally found that the opinions were not well
17 supported by clinical or laboratory findings. (AR 463). An ALJ
18 may discredit the opinions of a physician that are unsupported by
19 objective medical findings. *Tonapetyan v. Halter*, 242 F.3d 1144,
20 1149 (9th Cir. 2001); *Batson v. Barnhart*, 359 F.3d 1190, 1195 (9th
21 Cir. 2004). The ALJ gave specific and legitimate reasons to
22 discount Dr. Arnold's opinions and, thus, did not err in giving
23 minimal weight to his assessments.

24 Consistent with the ALJ's determination in this case, the
25 weight of the record evidence, as described above, demonstrates
26 that, prior to August 2004, Plaintiff's mental problems would
27 require Plaintiff to work in an alcohol-free environment, she
28 could not do complex memory tasks, she would need a structured

1 environment, she would have poor adaptive skills and decompensate
2 or slow during adjustment, she could not work in close proximity
3 to others because she would distract them, she would have slight
4 limitations on neatness, cleanliness, and accepting criticism and
5 she would be slow in learning detailed instructions. The record
6 exhibits Plaintiff's long history of drug use. As noted by the
7 ALJ in both decisions, "Plaintiff's history of illicit drug-
8 seeking; arrest for welfare fraud and lying to enforcement
9 officers; exaggeration of symptoms; contradictions in self-
10 reporting; malingered of psychopathology as well as a diagnosed
11 factitious neurological disorder totally overshadow her subjective
12 allegations." (AR 33, 462).

13 The ALJ is responsible for reviewing the evidence and
14 resolving conflicts or ambiguities. *Magallanes*, 881 F.2d at 751.
15 If evidence supports more than one rational interpretation, the
16 Court must uphold the decision of the ALJ. *Allen*, 749 F.2d at
17 579. It is the role of the trier of fact, not this Court, to
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The
19 Court may not substitute its own judgment for that of the ALJ even
20 if it might justifiably have reached a different result upon de
21 novo review. 42 U.S.C. § 405(g). The ALJ properly discounted the
22 assessments of Dr. Arnold, *supra*, and, contrary to Plaintiff's
23 arguments, the record does not support more restrictive
24 psychological findings in this case. The ALJ's RFC determination
25 is in accord with the weight of the record evidence.

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1 **C. Lay Witness Testimony**

2 Plaintiff lastly contends that the ALJ erred by rejecting the
3 testimony of lay witness Erika Klossner, Plaintiff's counselor
4 from Family Services Spokane. (Ct. Rec. 15, at 19-20). The ALJ
5 shall "consider observations by non-medical sources as to how an
6 impairment affects a claimant's ability to work." *Sprague v.*
7 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987), *citing* 20 C.F.R. §
8 404.1513(e)(2). The ALJ may not ignore or improperly reject the
9 probative testimony of a lay witness without giving reasons that
10 are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919
11 (9th Cir. 1993).

12 The ALJ indicated that, while he considered Ms. Klossner's
13 statements, the record evidence was given more weight. (AR 462).
14 An ALJ may discount lay testimony that conflicts with medical
15 evidence. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). The
16 ALJ noted that Ms. Klossner also made no distinction as to the
17 effect of Plaintiff's substance abuse on her mental condition.
18 (AR 462). In this case, the ALJ found Plaintiff's substance abuse
19 to be a contributing factor material to the determination of
20 disability (AR 461), and Plaintiff has not contested this finding.
21 Although Plaintiff asserts that she was substance free at the time
22 of Ms. Klossner's testimony, October 6, 2005, and the ALJ did not
23 ask Ms. Klossner about the effect of Plaintiff's substance abuse
24 (Ct. Rec. 15 at 19-20), the period at issue in this case is prior
25 to August 2004 and it is Plaintiff's burden to establish a prima
26 facie case of disability. *Hoffman v. Heckler*, 785 F.2d 1423, 1425
27 (9th Cir. 1986). The ALJ additionally noted the close
28 relationship between Plaintiff and Ms. Klossner and the

possibility that Ms. Klossner's statements were influenced by her desire to help Plaintiff. (AR 462). The undersigned finds that the foregoing reasons provided by the ALJ for rejecting the statements of Ms. Klossner were acceptable reasons for discounting her lay witness testimony.

CONCLUSION

Having reviewed the record and the ALJ's conclusions, the Court finds that the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff is thus not disabled within the meaning of the Social Security Act. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is **DENIED**.

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

IT IS SO ORDERED.

DATED this 7th day of July, 2008.

S/James P. Hutton

JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE